



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: MARCH 29, 2023

IN THE MATTER OF:

Appeal Board No. 627648

PRESENT: MARILYN P. O'MARA, MEMBERS

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective August 11, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by THE CHILDREN'S VILLAGE prior to August 11, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed January 13, 2023 (), the Administrative Law Judge granted the claimant's application to reopen A.L.J. Case No. 022-25171, and sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board, insofar as it sustained the initial determination disqualifying the claimant from receiving benefits, effective August 11, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was employed full time as a crisis specialist by the employer secure facility for four and a half years. The claimant's job responsibilities included, but were not limited to, intervening in crisis situations and ensuring the safety of the residents of the facility. The residents of the employer's facility included Adult Offenders (AOs), Juvenile

Offenders (JOs) and Juvenile Delinquents (JDs). According to the employer's protocol, if an employee feels sick or unsafe while at work, that employee needs to state that she feels unsafe or needs time, request time or distance from the situation, and contact is to be made with the director of security to inform him of the situation.

On August 4, 2021, the employer issued a written counseling memo to the claimant regarding her supervisor's contention that on July 15, 2021, she did not follow a directive. Also on August 4, 2021, the employer issued a written warning to the claimant regarding her conduct on July 21, 2021, and her supervisor's contention that she behaved in a disrespectful manner towards him. Neither writeup was signed by the claimant, who denied the conduct and asserted at the time that the supervisor was targeting her. Neither writeup includes a statement advising the claimant of the repercussions if further incidents of a similar nature occurred.

On the evening of July 28, 2022, residents were being transitioned from the "housing area" of the facility to the "schooling area" of the facility. These transitions were accomplished in groups of individuals, ensuring that one group was safely locked into classrooms before the next group was transitioned. The claimant and the two other crisis specialists on duty with her in the schooling area observed that one of the individuals being transitioned was supposed to be confined to the housing area, for an "early bed," a crisis team decision to penalize him for conduct he had engaged in the prior day. The crisis team questioned why this individual had been allowed to leave the housing area, and once he had been placed safely in a classroom, the claimant called the "control room" where an individual acknowledged an oversight by management, and that a mistake had been made. The claimant responded that they should let her know when she had clearance to transition this individual back to the housing area. Shortly thereafter, the claimant was told that the transition back was a "negative," and that the program manager (EJ) had decided to let the resident stay where he was, contrary to the instruction of the crisis team. When the resident involved learned that he was not going to be transitioned back to the housing area, he began cursing at and mocking the crisis team, and the claimant in particular, because he was not being required to go back to the housing area, saying that he knew EJ would not remove him.

After the residents being transitioned were in their classrooms, the crisis team members decided that the claimant should go to speak with EJ and explain

the crisis team's position. The claimant calmly approached EJ and an administrative assistant, GJ, in one of the facility's common areas, expressed frustration with EJ's decision, and asked again if the resident could be transferred back. EJ responded no. The claimant then asked if the resident could be confined to the housing area the following night, to make up for management's "oversight" of allowing him access to the schooling area that night. EJ again responded no. The claimant expressed concern that EJ's decision was removing authority from the crisis team when they had made a decision to segregate this individual because of his conduct; that the resident was laughing at the staff because EJ had taken away the crisis team's power. EJ told the claimant that he "appreciated her input," but that the resident was not being moved, and that she should return to the schooling area.

The claimant responded that she did not feel safe there, and asked for space and time, and the ability to make a phone call. EJ denied the claimant's request, and left the common area. GJ told the claimant that one of the residents was not locked in, so she had to wait until that was accomplished, and then she could leave. When permitted, the claimant left the building and went to the security trailer on the property and relayed what had happened to the director of security. She stated that she was okay to go back to work, but the director of security said it would be better if she went home.

The claimant's last day of work was August 10, 2022; she was discharged on August 12, 2022.

OPINION: The credible evidence establishes that the claimant was discharged on August 12, 2022 because the employer concluded that on July 28, 2022 she abandoned her post and was insubordinate when she did not follow the program manager's directive to return to her post. However, this record fails to establish conduct by the claimant during the final incident that amounts to an abandonment of her post, or insubordination, and fails to establish misconduct for unemployment insurance purposes.

We are not persuaded that counseling writeups issued by the employer in 2021 are close enough in time to the final incident to be relevant, much less dispositive. In addition, neither memo received into evidence included language putting the claimant on notice that future similar conduct would result in her discharge. Nor is the conduct addressed in the 2021 counseling memos sufficiently similar to the final incident to provide notice to the claimant that her conduct on July 28, 2022 would jeopardize her job.

We are not convinced that any meeting on the morning of July 28, 2022 was a significant factor in the employer's decision to fire the claimant. We note that EJ referred to it in passing at the end of the hearing, and when he was asked about any warnings the claimant may have received, he testified that the last incident that resulted in a warning was on July 15, 2021. Further, even if we were to credit EJ's testimony regarding what was said at that meeting, his testimony does not establish that the claimant was warned that her job could be in jeopardy.

We note that the hearing decision is based, in part, on the fact that the claimant could not identify the individual who trained her regarding what to do if she felt unsafe. However, the employer does not dispute that protocol for such situations exists. Indeed, the testimony of both employer witnesses supports a finding that such protocol was in place, and that the claimant's conduct on July 28, 2022, upon declaring that she felt unsafe, was in accordance with that protocol.

Accordingly, we find the claimant's failure to return to her post when EJ told her to, was not insubordination, since the claimant was following the employer's own protocols. Further, we find EJ's directive was not reasonable under the circumstances established, where the claimant expressed fear for her personal safety and concern over the diminished authority of the crisis team. By contrast, the claimant's conduct on July 28 was reasonable, given the employer's failure to take her concerns seriously, and failure to recognize the crisis team's position that allowing the resident to stay in schooling undercut the team's authority, creating a crisis situation, rather than avoiding one.

Under these circumstances, where the claimant was a member of the crisis team responsible for averting and responding to crisis situations, the claimant's conduct in response to an employer decision that resulted in a weakening of the authority of the crisis team and created an unsafe situation, did not amount to job abandonment, was not insubordination, and does not constitute misconduct under the Labor Law. Accordingly, we find that the claimant was separated from employment under nondisqualifying circumstances.

DECISION: The decision of the Administrative Law Judge, insofar as appealed from, is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective August 11, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to August 11, 2022 cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MARILYN P. O'MARA, MEMBER